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NO. 08-66

Supreme Court, U.S.
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In The

Supreme Court of the United States

TROY ANTHONY DAVIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

REPLY TO BRIEF IN OPPOSITION

CAPITAL CASE - EXECUTION SET FOR SEPTEMBER 23, 2008

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REPLY TO BRIEF IN OPPOSITION

The State of Georgia cannot execute Mr. Davis without any substantive post-trial process. The crux of Respondent's argument is that the "procedural history of Petitioner's case authorizes denial of certiorari." In other words, Respondent argues that the trial verdict and post-trial proceedings -- none of which included an evidentiary hearing to examine Mr. Davis' new evidence of innocence -- are sufficient procedure to ensure guilt. In this case, procedure without substance is not constitutionally sufficient. Further, Mr. Davis' petition to this Court attacks the constitutional sufficiency of the process by which the Georgia Supreme Court came its conclusion (i.e., determining materiality of Mr. Davis' evidence without a hearing). Respondents argument that the court's conclusion itself is a "adequate and independent" State ground for dismissal is unsound. Lastly, a hearing in this case is the minimal due process required because Mr. Davis was convicted solely on the credibility of State witnesses.

I. No Court Has Determined if Mr. Davis' New Evidence Shows He is Innocent

Contrary to Respondent's assertion, a thorough review of the procedural history in this case shows that Mr. Davis has never had an opportunity to prove his innocence. Despite repeated requests, Mr. Davis has never been granted an evidentiary hearing to evaluate his new evidence.

A. State Habeas Corpus Proceedings (1994-1997)

The State habeas court did not consider any of Mr. Davis' new innocence evidence. The Georgia Appellate Practice and Educational Resource Center filed a state habeas corpus petition on behalf of Mr. Davis on November 6, 1996 with 33 affidavits. Of the 33 affidavits, only 6 had any bearing on Mr. Davis' innocence. *See* Respondent's Brief in Opposition at Appendix 1 (listing affidavits submitted with Mr. Davis' 2007 Extraordinary Motion for New trial with a column indicating the forum to which the affidavit was first presented). The 6 affidavits submitted to the State habeas court contained only 1 of the 7 recantations Mr. Davis presented to the Georgia Supreme Court (the affidavit of Kevin McQueen). The issue at the State habeas evidentiary hearing dealt only with constitutional claims. Petitioner declined to present the 6 witnesses as the lion's share of his new innocence evidence (6 additional recantations and affidavits implicating and identifying Sylvester "Redd" Coles as the shooter) had yet to be discovered. The lion's share of Mr. Davis' innocence evidence submitted in his 2007 Extraordinary Motion for New Trial came to light during the federal habeas proceeding, which occurred 5 years after the State proceeding. *See id.*

Further, the State habeas court refused to make an innocence determination, holding that such fact finding was a "presumptuous usurpation" of the jury and that the State habeas court "is limited to evaluating whether Mr. Davis' rights were properly protected in the context of his jury trial." *See* Respondent's Brief in Opposition at 12 (*citing* State Habeas Corpus Order of 9/5/97 at p. 41). The federal habeas court recognized that the State habeas court had not relied on any of the 6 affidavits when it noted "the state court did not specifically refer to, and apparently did not rely on, any [of the 6 affidavits] in ruling on petitioner's habeas corpus

petition ..." Federal Habeas Court Order of 3/10/03 at 5 n. 1; 38.

B. Federal Habeas Corpus Proceedings (2001-2004)

During the federal habeas proceeding, Mr. Davis obtained the bulk of the affidavits that demonstrate his innocence and immediately submitted them to the federal habeas court and requested an evidentiary hearing. *See* Respondent's Brief in Opposition at Appendix 1.

The federal habeas court summarized Mr. Davis' new affidavits but did not admit them as part of the record, conduct any factual analysis or allow an evidentiary hearing.[1] Respondent concedes that "[t]he federal habeas court expressly stated that it would consider all of the material admitted during the *state* habeas proceedings." *See* Respondent's Brief in Opposition at 15 (emphasis added). As discussed above, the "material admitted during the State habeas proceeding" consisted of only 6 affidavits. *See id.* at Appendix 1. The federal habeas court declined to hold an evidentiary hearing or consider the lion's share of Mr. Davis' innocence evidence -- affidavits submitted for the first time in federal court -- because it found that the evidence was procedurally barred by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(e)(2).[2]

Respondents assertion that the federal habeas court examined Mr. Davis' innocence evidence is not supported by

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[1] *See* Federal Habeas Court Order of 3/10/03; Federal Habeas Court Order of 4/14/04.

[2] Federal Habeas Court Order of 3/10/03; Federal Habeas Court Order of 4/14/04.

the record. In the portions of the record cited by Respondents, the court summarized some of the affidavits and held that AEDPA did not allow the court to hold an evidentiary hearing on Mr. Davis' ineffective assistance of counsel claim "even if" the evidence showed his innocence.[3] Since the court believed that Mr. Davis did not meet the AEDPA's procedural requirements, the court did not hold an evidentiary hearing or consider the innocence question.[4] Thus, in no instance did the federal habeas court -- as asserted by the Respondent -- find that Mr. Davis "failed to establish he was factually innocent" or determine whether the new evidence "would undermine the court's confidence in the outcome of the proceedings."

C. Eleventh Circuit Court of Appeals

The Court of Appeals' declined to address Mr. Davis' innocence claim. Instead, the court found only that Mr. Davis' trial was free from constitutional error. *Davis v. Terry*, 465 F.3d 1249, 1253 (2006). The court bypassed the gateway innocence question and addressed only "the question of whether the district court erred in concluding that Davis' constitutional claims of an unfair trial" *See id.*

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[3] *See* Federal Habeas Court Order of 3/10/03 at 5-22; 37-41.

[4] *See id.* at 40-41; *see also* Federal Habeas Court Order of 4/14/04, *denying renewed motion for an evidentiary hearing* at 2 ("A showing of actual innocence does not, however, abrogate the requirements of [AEDPA] § 2254 (e)(2) so as to require -- or even allow -- an evidentiary hearing ....")

D. Extraordinary Motion for New Trial (2007-2008)

Immediately after this Court denied Mr. Davis certiorari, Mr. Davis filed a motion for new trial provided for under Georgia law in the Savannah trial court. The trial court denied Mr. Davis' motion and his request for an evidentiary hearing without addressing the substance of the 7 recantation affidavits or the evidence implicating Redd Coles. *See* Petition for Certiorari Appendix B at 24a-25a.

The day before Mr. Davis' scheduled July 17, 2008 execution date, the Georgia Board of Pardons and Parole held a hearing and questioned five witnesses, including 4 of the 7 recanted witnesses. Immediately after the hearing, the Board issued a 90-day stay.

After the stay was issued, the Supreme Court of Georgia granted Mr. Davis' appeal. Contrary to Respondent's assertion, Mr. Davis raised claims in the trial court and Georgia Supreme Court that due process requires an evidentiary hearing to vindicate his Eighth Amendment and State-created rights. In its initial opinion, the Supreme Court of Georgia declined to address Mr. Davis' constitutional claims at issue in this petition because it erroneously believed that the claims were "not asserted distinctly in the trial court." In his Motion for Reconsideration, Mr. Davis presented the Georgia Supreme Court with his July 13, 2007 supplemental trial court brief raising the constitutional claims at issue in this petition. Realizing its error, the Supreme Court of Georgia withdrew this portion of its opinion and issued a substitute opinion holding that "Davis argued in the trial court that to apply Georgia's procedures for extraordinary motions for new trial in a manner that allows for his execution would be unconstitutional. Georgia law, as described and applied above, is not unconstitutional." *Davis v. State*, 283 Ga. 438, 448 (2008)(citing *Herrera*).

A bare majority of the Supreme Court of Georgia affirmed the trial court, leading to the instant Petition for Certiorari. The Georgia Supreme Court concluded that Mr. Davis' new evidence did not warrant a new trial or an evidentiary hearing because the facts stated in his affidavits were not so material as to probably result in a different verdict. Mr. Davis files the instant Petition attacking the constitutional sufficiency of the process by which the Georgia Supreme Court came to such a conclusion (i.e., determining materiality of recantations without reference to credibility, which, in this case, only a hearing could determine).

II. Factual Findings Resulting From an Unconstitutional Process Are Not "Adequate and Independent" State Grounds for Dismissal

Federal courts will not disturb State judgments if there is an adequate and independent state ground for the decision. *See Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). However, the conclusion reached in a constitutionally deficient process is not an "adequate or independent" State ground for dismissal. The Georgia Supreme Court held that Georgia's procedures for extraordinary motions for new trial, as described and applied by the court, are "not unconstitutional." *Davis*, 283 Ga. at 448; Petition App. A at 16a.

Respondent argues that the Georgia Supreme Court's finding that Mr. Davis' new evidence was not "so material that it would probably result in a different verdict" is an independent and adequate state ground for dismissal.[5] The crux of Mr. Davis' federal claims, however, is that the

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[5] Respondent's Brief in Opposition at 31-32; *see also Davis*, 283 Ga. at 440.

process the State courts used to conclude his new evidence was immaterial was constitutionally deficient. In other words, the State courts' failure to hold an evidentiary hearing was sure to "invite arbitrariness and error" in the determination that Mr. Davis' new evidence was not "so material as to probably result in a different verdict." Thus, the state grounds for declining to hold an evidentiary hearing -- the court's conclusion that Mr. Davis' evidence was immaterial -- is not an independent of his federal claims since the process by which the state ground was determined was constitutionally flawed.

Several cases discussed in Mr. Davis' Petition demonstrate the fallacy of Respondent's argument. For example, in *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court determined that the process employed by Florida to determine whether an inmate facing execution was sane did not provide sufficient due process. The Florida statute left insanity determinations to the Governor. The Florida Governor determined Ford was sane without holding a hearing. This Court found that the Florida fact-finding procedure "invites arbitrariness and error ... [and] does not, therefore comport with due process" and ordered an evidentiary hearing. *Id.* at 424. *See also Panetti v. Quarterman*, 127 S.Ct 2842 (2007) (finding a State court's sanity determination violated due process because the State court did not hold a hearing or allow the condemned inmate to submit insanity evidence, which invited "arbitrariness and error" into the State court's conclusion).

Applying Respondent's argument to these cases, this Court would have had no jurisdiction to decide *Ford* or *Panetti* because the State's initial determination that the Ford or Pannetti were sane -- regardless of the process used to come to those conclusions -- would have been an independent and adequate State ground for the decision.

This Court in *Vitek v. Jones*, 445 U.S. 480 (1980), addressed an argument similar to Respondent's, holding:

> [I]f the State grants a prisoner a right or expectation that adverse action will not be taken against him except upon the occurrence of specified behavior, **'the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.' These minimum requirements being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.** In *Morrissey*, *Gagnon*, and *Wolff*, the States had adopted their own procedures for determining whether conditions warranting revocation of parole, probation, or good-time credits had occurred; yet we held that those procedures were constitutionally inadequate. 445 U.S. at 490-91 (emphasis added).

Further, the mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). Here, the Georgia Supreme Court clearly denied Mr. Davis an evidentiary hearing based on its assessment that the affidavits did not state "facts sufficient" to grant a motion "in light of the requirement [under State law] that newly-discovered evidence be so material that it probably would result in a different verdict." *Davis*, 283 Ga. at 440; Petition App. A at 5a. The Court offered no other basis to deny the evidentiary hearing.

Thus, any other State ground Respondent alleged was "adequate or independent" does not deny this Court jurisdiction.

Lastly, this Court has often held that a State rule is not "adequate" for dismissal unless it is "strictly or regularly followed." *Johnson*, 486 U.S. at 587 (citing cases). Mr. Davis cited several Georgia cases showing that Georgia Courts, including the Georgia Supreme Court, have often ordered hearings in recantation cases with far less evidence than presented here. *See* Petition at 28 with accompanying n. 18 (citing examples of single recantation cases in which an evidentiary hearing was ordered).

III. An Evidentiary Hearing in this Case is Appropriate Because Mr. Davis Was Convicted Solely on the Credibility of State Witnesses

This Court has held that procedural due process requires "protections as the particular situation demands." *See Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Respondent concedes that Mr. Davis' trial hinged largely on the credibility of State witnesses. The vast majority of those witnesses have now recanted in sworn statements. Thus, Mr. Davis' guilt hinges largely on credibility that, in this case, can only be determined by an evidentiary hearing.

A. The Objective Facts Adduced At Trial Do Not Point To Mr. Davis As the Shooter

The objective evidence (i.e., evidence that is undisputed, physical evidence or evidence that does not require a credibility determination) implicates Redd Coles as the shooter.

(i) The Murder of Officer MacPhail in the Greyhound Parking Lot

The objective trial evidence showed that Officer MacPhail was murdered by Redd Coles with a .38 caliber revolver after pistol-whipping Larry Young. Larry Young walked by Redd Coles with a six-pack of beer. Coles demanded that Young give him a beer. Young refused and walked away. Coles began following and loudly harassing Young. Bystanders to the Coles-Young argument, including Mr. Davis, followed the scuffle. Mr. Davis did not utter a word. As Young tried to retreat, Coles threatened Young by stating "you don't know me, I'll shoot you" and began digging in his pants for a gun. Moments later, Young was struck in the head with a gun. Young yelled out and Officer MacPhail responded. MacPhail was shot dead with a .38 caliber revolver by Young's assailant.

An hour before Officer MacPhail was killed in the parking lot of the Greyhound bus station, Michael Cooper was shot when the car in which he was riding came under fire from an unidentified gunman. Shell casings found near the car shooting matched a casing found near Coles' home and the Greyhound bus station where Officer MacPhail was killed. The shell casings were fired from a .38 caliber revolver. Mr. Coles admitted to carrying a .38 caliber revolver on the night of the shootings but was unable to produce it for ballistics testing.

Coles visited the police station the next day with his lawyer and implicated Troy Davis. Before Coles' initial statement, the police had no suspects. The same day, the police searched Mr. Davis' house and found no gun. The police did not search Redd Coles' house for his .38 caliber revolver and never included Coles' picture in photo line-ups shown to witnesses.

(ii) The State's Case Relied Entirely on the Credibility of Nine State Witnesses

On Monday August 21, 1989, the Savannah newspaper ran Troy Davis' picture on the front page under the headline "POLICE PUSH HUNT FOR KILLER." Wanted posters with Troy Davis' picture were plastered around the crime scene where most of the eyewitnesses lived or worked and Troy's picture was used extensively on the evening news. Mr. Davis and Redd Coles are both African-American males that were of similar age, height and weight.

State eyewitnesses identified Troy Davis in a Coles-free photographic line-up well after Mr. Davis' picture had widely circulated in the media. These witnesses' testimony contradicted earlier police statements that implicated Coles, were recanted at trial or were solely in-court identifications given two years after the shooting. The remaining three State witnesses consisted of a jailhouse snitch who testified to widely inaccurate facts and two witnesses who partially recanted their police statements at trial and testified that their police statements (used as affirmative evidence against Mr. Davis) were the product of intimidation by the investigating detectives.

All credible State witnesses have recanted their testimony. Seven of the nine State witnesses have recanted their testimony. The only remnants of the State's case against Mr. Davis is the self-interested testimony of Redd Coles and the identification Steve Sanders gave for the first time at trial, two years after the shooting that contradicted his initial police statement that "he wouldn't recognize the shooter again if he saw him."

Only an evidentiary hearing would show that the State witness recantations are credible. The cumulative effect of the 7 recantations combined with several witnesses who implicated or identified Redd Coles in post-trial affidavits would, if found credible, eviscerate the State's case against Mr. Davis and show that the new evidence is "so material as

to probably result in a different verdict." Thus, the minimum due process appropriate in this case is an evidentiary hearing to assess the credibility and cumulative materiality of the new evidence. *The State of Georgia cannot execute Mr. Davis* without any substantive post-trial process.

Respectfully submitted,

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